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IN THE

Supreme Court of the United States

OCTOBER TERM, 1949.

Nos. 780 and 781.

WILLIAM J. DRURY,

Petitioner,

vs.

STEPHEN E. HURLEY, JOHN W. CLARK and ALBERT E. WILLIAMS, Civil Service Commissions of the City of Chicago,

Respondents,

and

THOMAS E. CONNELLY,

Petitioner,

vs.

STEPHEN E. HURLEY, JOHN W. CLARK and ALBERT E. WILLIAMS, Civil Service Commissioners of the City of Chicago,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI.

MAY IT PLEASE THE COURT:

The respondents Stephen E. Hurley, John W. Clark and Albert E. Williams, Civil Service Commissioners of the City of Chicago oppose the petition for certiorari on the following grounds:

FOREWORD.

The facts and issues involved in the *William J. Drury* and the *Thomas E. Connelly* cases being identical (*Connelly* v. *Hurley,* 402 Ill. 236, 238; *Drury* v. *Hurley,* 339 Ill. App. 33, 36-37), the respondents will follow the procedure used by the petitioners and file only one brief in opposition to the petition for certiorari.

On May 1, 1950 the attorney for the petitioners served respondents with notice that on April 27, 1950 a Petition for Writ of Certiorari was filed with the Clerk of the Supreme Court of the United States. According to the rules of this court the time for the petitioners to file their Petition for Writ of Certiorari expired on April 12, 1950. Investigation disclosed that the petitioners, without notice to the respondents, appeared before Mr. Justice Sherman Minton on April 5, 1950 and secured an order extending the time within which to file their Petition for Writ of Certiorari to April 27, 1950.

At the time the attorney for the petitioners served the above-mentioned notice he also served a copy of the Abstract of Record filed by petitioner Connelly in the office of the Clerk of the Supreme Court of Illinois in connection with his Petition for Leave to Appeal from the decision of the Appellate Court. He failed to serve a copy of the Transcript of Record as required by Rule 38 of the Supreme Court of the United States. On May 10, 1950 we communicated with the Honorable Charles Elmer Cropley, Clerk of the Supreme Court of the United States, and were informed that the attorney for the petitioners, again without notice, secured an order of this court dispensing with the printing of the complete record as provided by the rules of court.

Under the circumstances it will be impossible for us to refer to pages in the Transcript of the Record in discussing the facts. We will be compelled to use the abstract filed in the Supreme Court of Illinois in the *Drury* case for page references as to the facts we believe pertinent.

STATEMENT OF FACTS.

The petitioners have rearranged and misstated the facts, most of them without abstract references, with the result that the facts, as stated by them, are most confusing and in many respects not sustained by the record. Oddly, the petitioners go far afield from judicial precedent and call this court's attention to matters admittedly not in the record (Petition p. 6), and, at least at one point in their petition (p. 9), call this court's attention to an unauthenticated book published in 1950, approximately three years after the facts which form the basis of this litigation took place. We could answer the remarks made in "Chicago Confidential" by calling this court's attention to numerous editorials which have appeared from time to time in the majority of the Chicago newspapers which laud the action of the Civil Service Commission of the City of Chicago and of the Appellate and Supreme Courts of the State of Illinois in removing the petitioners from their positions in the Police Department of the City of Chicago. However, we believe that ethical practice requires us to limit our discussion to the facts and circumstances appearing in the record and the legal principles applying thereto. The respondents do, however, believe it necessary to state the facts as disclosed by the record and as found by the Appellate Court of Illinois (*Drury* v. *Hurley*, 339 Ill. App. 33)

and the Supreme Court of Illinois (*Drury* v. *Hurley*, 402 Ill. 243).

On April 2, 1947, William J. Drury, a Lieutenant in the Police Department of the City of Chicago, and Thomas E. Connelly, a Captain in the Police Department of the City of Chicago, were suspended by the Commissioner of Police (Abst. 15, 34). Thereafter, on April 24, 1947, the Commissioner filed separate charges with the Civil Service Commission of the City of Chicago against Drury and Connelly, charging them with conduct unbecoming a police officer (1) in refusing to sign an immunity waiver when summoned to appear before the March 1947 Grand Jury of Cook County, Illinois, and (2) in unlawfully conspiring amongst themselves and LeRoy Russell and John White to procure the indictment of Dave Yaris, William Block and Leonard Patrick, for the murder of one James M. Ragen, and in inducing Russell falsely to identify Block as a participant therein (Abst. 28, 29). A lengthy hearing was held by the Civil Service Commission sitting as a Trial Board which, on October 16, 1947, filed its Finding and Decision (Abst. 28-51, 105) holding that there was not sufficient evidence to sustain the charges filed against Drury and Connelly of unlawful conspiracy relating to the procurement of the indictment of Yaris, Block and Patrick for the murder of Ragen or of inducing Russell falsely to identify Block as a participant therein (Abst. 36). The Commission, after a discussion of the rights of a policeman to refuse to sign an immunity waiver when called to testify before a Grand Jury on matters arising out of his employment and his right to retain his position as a policeman after such refusal, held that such refusal was conduct unbecoming a police officer and ordered the discharge of Drury and Connelly from their positions in the

Police Department and from the service of the City of Chicago (Abst. 50, 51).

On October 16, 1947 the Civil Service Commission rendered its written Finding and Decision (Abst. 28-51, 105) finding Drury and Connelly guilty of conduct unbecoming a police officer for their refusal to sign an immunity waiver, when requested so to do, when they appeared before the March 1947 Grand Jury of Cook County, Illinois, and ordering their removal from the Department of Police of the City of Chicago, and as a member of such department and from the service of the City of Chicago (Abst. 50). On October 16, 1947 the Commission certified its Finding and Decision to the Commissioner of Police and directed the Commissioner of Police to put the order of discharge and removal into effect forthwith (Abst. 109). The Commissioner of Police reported to the Civil Service Commission that he did, on October 16, 1947, discharge Drury and Connelly from the Police Department and from the service of the City of Chicago for violation of Rule 389, Section 3—Conduct Unbecoming a Police Officer or an Employe of the Police Department, which report was received by the Civil Service Commission on October 20, 1947, and approved October 21, 1947 (Abst. 112).

The trial court, on January 28, 1948, rendered a written statement of reasons for its decision sustaining the motion of Drury and Connelly to quash the record of proceedings of the Civil Service Commission of the City of Chicago and, ordering the reinstatement of Drury and Connelly, found "that the Civil Service Commission acted very carefully and certainly exercised no prejudice against plaintiffs herein in its conduct of said proceeding. Its Finding and Decision impresses the Court that it gave ample opportunity to the plaintiffs to be heard in their own defense and in its finding and decision reflects what

the record shows, a frank and honest statement of the facts favorable to each of the plaintiffs" (Abst. 120, 121, 131).

The trial court adopted the findings of fact of the Civil Service Commission in its entirety but differed in its conclusion of law, based on said facts. The court held that a police officer cannot be removed from his position on a charge of conduct unbecoming a police officer if he refuses to sign an immunity waiver when called upon to testify before the Grand Jury as to matters arising out of and within the scope of his employment (Abst. 131-132).

The Appellate Court (*Drury* v. *Hurley,* 339 Ill. App. 33) made the following findings of fact (pp. 35-37):

> "William J. Drury and Thomas E. Connelly filed separate petitions for writs of certiorari to review the action of the Civil Service Commission of the City of Chicago which had ordered them discharged from their positions as lieutenant and captain of police, respectively, in the classified service of the Department of Police in the City of Chicago, because of their refusal to execute in writing immunity waivers when summoned and prior to testifying before the March 1947, grand jury concerning matters arising out of their investigation of the shooting of one James M. Ragen. In September 1946, the two officers had been assigned by the Commissioner of Police to investigate some 80 unsolved murders, including the shooting on June 24, 1946, of Ragen, which resulted in his death some time afterward. In due course they interviewed three witnesses from whom they obtained signed statements that they could identify the occupants of the moving truck from which Ragen had been shot. Partly on the strength of their testimony and that of the two petitioners, who also testified before the grand jury on March 17, 1947, without claiming immunity, three men were indicted for the murder. Later, two of the witnesses recanted their testimony and when again called before the grand jury on April 2, 1947, stated that they could identify no one implicated in the Ragen

shooting. Petitioners were forthwith summoned and each in turn appeared before the grand jury. As matters developed they had reason to believe that they were suspected of having conspired to obtain an unfounded indictment of the Ragen murder suspect, through subornation of perjury, bribery and threats, and that their testimony might be sought in an inquiry as to their own conduct in an investigation of that crime. Accordingly, when asked to sign immunity waivers, they refused to do so, and were excused without questioning. They were thereupon promptly suspended by the Commissioner of Police who subsequently filed with the Civil Service Commission charges that they were guilty of conduct unbecoming an officer (1) in refusing to waive immunity, and (2) in unlawfully conspiring among themselves and others to procure an indictment of three persons for the murder of Ragen. Because of the similarity of the charges and by stipulation of counsel, the cases against both police officers were jointly heard by the Civil Service Commission which found that the evidence before it was insufficient to sustain the charge of unlawful conspiracy relating to the procurement of the indictments, but held that refusal to sign the immunity waiver was in effect a refusal to testify unless immunity be granted them, and was therefore conduct unbecoming a police officer and cause for dismissal. The discharged officers instituted separate proceedings for writs of *certiorari* to review the action of the Civil Service Commission. The trial judge who heard the petitions entertained motions to quash the writs, and in a written opinion found that 'the Commission acted very carefully and certainly exercised no prejudice against the plaintiffs herein in its conduct of said proceeding . . . it gave ample opportunity to the plaintiffs to be heard in their own defense and in its finding and decision reflects what the record shows, a frank and honest statement of the facts favorable to each of the plaintiffs,' but gave as his reasons for sustaining the officers' motions (1) that while they did refuse to sign an immunity waiver when called before the grand jury, they at no time refused to testify, and (2) that as a matter of law the refusal of the officers

to waive their constitutional privilege in advance of testifying did not constitute cause for removal. Because the trial court held that the discharge of petitioners for failure to execute in writing an immunity waiver would deprive them of their constitutional rights, defendants perfected a direct appeal to the Supreme Court of Illinois, which held (*Drury* v. *Hurley* (1949), 402 Ill. 243) that 'there is no constitutional question involved in this proceeding such as would give us jurisdiction,' and accordingly transferred the cause to this court for determination."

The Supreme Court of Illinois, in transferring the cause to the Appellate Court of Illinois, First District (*Drury* v. *Hurley*, 402 Ill. 243), found the facts to be as follows (pp. 244-245):

"April 24, 1947, the commissioner of police of the City of Chicago filed separate charges with the civil service commission of said city against appellee and Captain Thomas E. Connelly, both members of the police department of the city. The charges were similar as to each, and by stipulation were heard jointly by the commission, but separate decisions and findings were made in each case.

Appellee and Connelly had been assigned the duty of investigating the murder of one James M. Ragen which took place June 24, 1946. Through their efforts witnesses were found whose testimony aided in having three persons indicted for the murder of Ragen. Thereafter two of the witnesses who testified before the grand jury recanted their former testimony and accused appellee and Connelly, in substance, of intimidating them and forcing them to testify before the grand jury. The story of these witnesses led to an investigation of the actions of the police officers and they were indicted with others for conspiracy to procure a false indictment for the murder of Ragen against those charged with that crime.

Appellee and Connelly were called as witnesses before the grand jury investigating the charge against them and requested to sign immunity waivers which

they refused to do. Following is a copy of the immunity waiver:

'I, ... have been advised of my legal rights, I now know I cannot be compelled or forced to give testimony against myself before the Grand Jury or any Court. I now know I do not have to make any statement nor give any answers to any question that may tend to incriminate me. I now know that whatever I say here can be used against me in any criminal proceeding involving the subject matter of my testimony.

No one has forced me, by threats or otherwise, or promised me anything either directly or indirectly to appear and testify before the Grand Jury.

Of my own free will and with full knowledge of my rights in this matter I am willing to testify before the Grand Jury and I hereby waive all claim of immunity that I may have by reason of my appearing and giving testimony before the Grand Jury concerning certain matters of which I have knowledge.'

The officers thereafter were charged with conduct unbecoming a police officer in refusing to sign said immunity waiver, were tried by the commission and found guilty and were ordered removed from service. On *certiorari* in the superior court the action of the commission was set aside and this appeal followed."

It will be noted that the statement of facts by the Supreme Court of Illinois is, in legal effect, the same as the findings of fact by the Appellate Court.

POINTS AND AUTHORITIES.

I.

The petitioners failed to raise any constitutional issues in the State Courts, and are, therefore, precluded from seeking a review in this Court.

Drury v. *Hurley*, 402 Ill. 243.
Drury v. *Hurley*, 339 Ill. App. 33.
1949 Ill. Rev. Stat. ch. 24½, par. 51.
1949 Ill. Rev. Stat. ch. 110, par. 199.
Prudential Ins. Co. v. *Richman*, 292 Ill. App. 261.
Penman v. *Village of Philo*, 309 Ill. App. 49.
Wilson v. *Cook*, 90 L. Ed. 793, 327 U. S. 474.
Neblett v. *Carpenter*, 83 L. Ed. 182, 305 U. S. 297, 59 S. Ct. 170.
Cooper v. *Palais Royal Theatre Co.*, 320 Ill. 44, 49.
Oliver v. *Retirement Board*, 375 Ill. 641, 642.
Dean v. *Board of Education*, 386 Ill. 156, 157.

II.

The petitioners waived all constitutional issues, if any, by not appealing to this court from the judgment of the Supreme Court of Illinois which transferred the cause to the Appellate Court of Illinois, First District.

Drury v. *Hurley*, 402 Ill. 243.
The People v. *Richardson*, 397 Ill. 84.
The People v. *Rosenthal*, 370 Ill. 244, 247.
Central U. Teleph. Co. v. *Edwardsville*, 70 L. Ed. 229, 269 U. S. 190, 46 S. Ct. 90.
Parker v. *Illinois*, 92 L. Ed. 886, 333 U. S. 571, 68 S. Ct. 708.

III.

The Appellate Court of Illinois properly held that the petitioners' refusal to sign an immunity waiver, prior to testifying before the Grand Jury, concerning matters arising out of and during the course of their employment was "cause" for removal.

Bowles v. *Misle*, 64 Fed. Supp. 835.

Wilson v. *United States*, 221 U. S. 361, 31 S. Ct. 538, 55 L. Ed. 771.

Shapiro v. *United States*, 335 U. S. 1, 68 S. Ct. 1375, 92 L. Ed. 1787.

In Re Holland, 377 Ill. 346.

People Ex Rel. Clifford v. *Scannell*, 77 N. Y. Supp. 704.

McAuliffe v. *Mayor, etc., of City of New Bedford*, 29 N. E. (Mass.) 517.

United Public Workers v. *Mitchell*, 91 L. Ed. 754, 330 U. S. 75, 67 S. Ct. 556.

Goldway v. *Board of Higher Education*, 37 N. Y. S. 2nd, 34.

Souder v. *City of Philadelphia*, 156 Atl. (Pa.) 245.

Scholl v. *Bell*, 102 S. W. (Ky.) 248.

Christal v. *Police Com. of San Francisco*, 92 P. 2nd. (Cal.) 416.

Canteline v. *McClellan*, 24 N. E. 2nd (N. Y.) 972.

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O'Regan v. *City of Chicago* (cited with approval in the case of *Coane* v. *Geary*, 298 Ill. App. 199, 206).

In Re Harriss, 364 Ill. 290.

IV.

Class legislation and discrimination is not an issue in the case at bar.

The People v. *Kipley*, 171 Ill. 44.
The People v. *City of Chicago*, 237 Ill. 100.

ARGUMENT.

I.

The petitioners failed to raise any constitutional issues in the State Courts and are, therefore, precluded from seeking a review in this court.

The Trial Court, in its reasons for its decision sustaining the motion of the petitioners to quash the record, stated (Abst. 131-132):

> "This Court holds, as a proposition of law, that a refusal of the plaintiffs, Connelly and Drury, to execute in writing an immunity waiver and to waive in advance their constitutional rights, under the circumstances disclosed by this record showing no refusal to testify before the Grand Jury and showing that they freely testified before the Civil Service Commission which exonerated them, does not constitute cause for removal. To permit a record such as the one returned in this cause to stand would deprive the plaintiffs of their constitutional rights and do violence to the provisions of Section 12 of the Civil Service Act, prohibiting removal except for just cause."

Because of the statement of the Trial Court that "To permit a record such as the one returned in this cause to stand would deprive the plaintiffs of their constitutional rights * * *" the Civil Service Commission perfected an appeal to the Supreme Court of Illinois (*Drury* v. *Hurley*, 402 Ill. 243). The Supreme Court of Illinois in holding that there was no constitutional question involved and in transferring the cause to the Appellate Court of Illinois, for the First District, said (pp. 246-247):

> "We have uniformly held that there is no constitutional question presented such as to give us jurisdic-

tion of a direct appeal where the judgment or decree is assailed on the ground that its enforcement will deprive the person against whom enforcement is sought of some constitutional right. A few cases so holding are *Chapralis* v. *City of Chicago,* 389 Ill. 269; *Trustees of Schools* v. *City of Chicago,* 373 Ill. 508; *O'Connor* v. *Rathje,* 368 Ill. 83; *Cooper* v. *Palais Royal Theatre Co.* 320 Ill. 44.

"The prayer for relief in the lower court was that a writ of *certiorari* issue commanding the commissioners to certify and file a complete record of the proceedings of the civil service commission and that the finding and order of said commissioners be reversed and set aside as wholly for naught esteemed. It will be noted that there was no request for a construction of any constitution. The superior court did not construe any constitution and no error assigned indicates that it did. Before this court will take jurisdiction on the ground that a constitutional question is involved, it must appear from the record that a fairly debatable constitutional question of the character mentioned in the Civil Practice Act was urged in the lower court, the ruling on which is preserved in the record for review and error assigned thereon in this court. *Perlman* v. *Thomas Paper Stock Co.* 378 Ill. 238; *People ex rel. Rexses* v. *Cermak,* 317 Ill. 590; *Griveau* v. *South Chicago City Railway Co.* 213 Ill. 633.

"The mere assertion that a constitutional question is involved or that a constitutional right has been invaded is not sufficient, in the absence of other grounds, to confer jurisdiction, (*Hawkins* v. *Hawkins,* 350 Ill. 227,) as no duty rests upon the court to discover a basis on which jurisdiction to entertain the appeal can be sustained. (*Economy Dairy Co.* v. *Kerner,* 371 Ill. 261; *City of Chicago* v. *Peterson,* 360 Ill. 177; *People* v. *Davies,* 350 Ill. 48.) It seems clear in this case that neither party is complaining of any constitutional provision, nor is either party requesting the construction of any constitutional provision. The difference between them seems to be whether or not the exercising of a right in refusing to sign the immunity waiver is ground for removal."

The Appellate Court (*Drury* v. *Hurley*, 339 Ill. App. 33), in reversing the judgment of the Trial Court and sustaining the action of the Civil Service Commission of the City of Chicago discharging the petitioners from the Police Department of the City of Chicago, took cognizance of the decision of the Supreme Court of Illinois which stated that there was no constitutional question involved, saying (p. 37):

> "Because the trial court held that the discharge of petitioners for failure to execute in writing an immunity waiver would deprive them of their constitutional rights, defendants perfected a direct appeal to the Supreme Court of Illinois, which held (*Drury* v. *Hurley* (1949), 402 Ill. 243) that 'there is no constitutional question involved in this proceeding such as would give us jurisdiction,' and accordingly transferred the cause to this court for determination."

The fact that the Appellate Court did not consider any constitutional question is apparent when it stated the question presented to it for decision to be (p. 42):

> "The basic question is not the right of the police officers to exercise a constitutional privilege, but whether their refusal to sign an immunity waiver was a breach of their public trust which impaired the efficiency standards and morale of the police department of the City of Chicago and therefore constituted conduct unbecoming a police officer and was 'cause' for removal under section 12 of the Civil Service Act."

It is apparent, therefore, that neither the Supreme Court nor the Appellate Court of Illinois determined a constitutional question but rather limited their decisions to a construction of the statute, namely, whether petitioners' refusal to sign immunity waivers constituted conduct unbecoming a police officer and was "cause" for removal under Section 12 of the Cities Civil Service Act of the State of Illinois (1949 Ill. Rev. Stat., ch. 24½, par. 51). In fact the

Appellate Court is without jurisdiction to consider constitutional questions (1949 Ill. Rev. Stat. ch. 110, par. 199; *Prudential Ins. Co.* v. *Richman,* 292 Ill. App. 261; *Penman* v. *Village of Philo,* 309 Ill. App. 49).

This court and the Illinois Supreme Court have consistently held that the construction of a statute does not raise a constitutional issue.

Wilson v. *Cook,* 90 L. Ed. 793, 327 U. S. 474.
Neblett v. *Carpenter,* 83 L. Ed. 182, 305 U. S. 297, 59 S. Ct. 170.
Cooper v. *Palais Royal Theatre Co.,* 320 Ill. 44, 49.
Oliver v. *Retirement Board,* 375 Ill. 641, 642.
Dean v. *Board of Education,* 386 Ill. 156, 157.

In *Wilson* v. *Cook,* 90 L. Ed. 793, 327 U. S. 474 this court said (90 L. Ed. 799):

> *"Under Section 237 of the Judicial Code we are without jurisdiction of the appeal in No. 328, unless there was 'drawn in question' before the Supreme Court of Arkansas 'the validity of a statute' of the state, 'on the ground of its being repugnant to the Constitution, . . . or laws of the United States.' The purpose of this requirement is to restrict our mandatory jurisdiction on appeal. Memphis Natural Gas Co.* v. *Beeler,* 315 U. S. 649, 651, 86 L. ed. 1090, 1094, 62 S. Ct. 857, *and to make certain that no judgment of a state court will be reviewed on appeal by this Court unless the highest court of the state has first been apprised that a state statute is being assailed as invalid on federal grounds, Charleston Fed. Sav. & L. Asso.* v. *Alderson,* 324 U. S. 182, 185, 186, 89 L. ed. 857, 860, 861, 65 S. Ct. 624 and cases cited, or, when the statute, as applied, is so assailed, until it has opportunity authoritatively to construe it. *Fisk* v. *Kansas,* 274 U. S. 380, 385, 71 L. ed. 1108, 1110, 47 S. Ct. 655 and cases cited. *This jurisdictional requirement is satisfied only if the record shows that the question of the validity under federal law of the state statute, as construed and applied, has either been presented for decision to the highest court*

of the state, Wall v. *Chesapeake & O. R. Co.,* 236 U. S. 125, 126, 65 L. ed. 856, 857, 41 S. Ct. 402; *Citizens Nat. Bank* v. *Durr,* 257 U. S. 99, 106, 66 L. ed. 149, 152, 42 S. Ct. 15, *or has in fact been decided by it, Nickey* v. *Mississippi,* 292 U. S. 393, 394, 78 L. ed. 1323, 1324, 54 S. Ct. 743; *Whitfield* v. *Ohio,* 297 U. S. 431, 435, 436, 80 L. ed. 778, 781, 782, 56 S. Ct. 532, *and that its decision was necessary to the judgment. Cuyahoga River Power Co.* v. *Northern Realty Co.,* 244 U. S. 300, 304, 61 L. ed. 1153, 1157, 37 S. Ct. 643 and cases cited. The record in this case does not disclose that at any time in the course of the proceedings in the state courts plaintiffs asserted the invalidity of a state statute on any federal ground." (Italics ours.)

In the case at bar the Supreme Court of Illinois specifically held that there was no constitutional question involved; that no constitutional issue was presented by the record; and transferred the cause to the Appellate Court of Illinois, First District. The Appellate Court stated that the only issue presented to it for decision was the construction of a statute as to whether the petitioners' refusal to sign immunity waivers constituted conduct unbecoming a police officer which was "cause" for removal under Section 12 of the Cities Civil Service Act of the State of Illinois. The record fails to disclose a federal constitutional question presented to the court for decision and, therefore, the petition for writ of certiorari should be denied.

II.

The petitioners waived all constitutional issues, if any, by not appealing to this court from the judgment of the Supreme Court of Illinois which transferred the cause to the Appellate Court of Illinois, First District.

In their petition the petitioners state (pp. 22-23):

> "In a petition for rehearing filed before said Civil Service Commission it was urged in paragraphs 11, 12, 13, 14 and 18, thereof that the rights of petitioners under the Fifth Amendment to the United States constitution were violated by the ruling, findings and order of the Civil Service Commission, and was raised in the petitions for Certiorari in the Superior Court of Cook County (Drury Abst. 66, 67). And in paragraph 14 thereof it was pointed out that rights had been accorded to a lawyer and denied to petitioners as policemen.
>
> "The Superior Court of Cook County was asked to quash the record of the Civil Service Commission upon the ground that it violated the Fourteenth Amendment to the United States Constitution (Drury Abstract 119). And in reversing and quashing the return and record of the Civil Service Commission the Judge in his opinion held that the discharge because of refusal to waive the constitutional right against self-incrimination under the instant circumstances was not warranted (Drury Abstract 131)."

The Supreme Court of Illinois in transferring the cause to the Appellate Court (*Drury* v. *Hurley,* 402 Ill. 243) concluded (p. 247):

> "In our opinion there is no constitutional question involved in this proceeding such as would give us jurisdiction and the cause is therefore transferred to the Appellate Court for the First District.
>
> *Cause transferred.*"

The decision of the Supreme Court, in transferring the cause to the Appellate Court because in its opinion there was no constitutional question involved, was directly contrary to and overruled the theory of the petitioners that the decision of the Civil Service Commission violated the Fifth and Fourteenth Amendments to the United States Constitution. If the petitioners were of the opinion that the action of the Civil Service Commission violated the Fifth and Fourteenth Amendments of the United States Constitution (as they now contend) they should have appealed to this court from the decision of the Supreme Court of Illinois transferring the cause to the Appellate Court, for the First District. By failing to perfect such an appeal, and joining issue in the Appellate Court, the petitioners waived all constitutional questions.

The People v. *Richardson*, 397 Ill. 84.
The People v. *Rosenthal*, 370 Ill. 244, 247.
Central U. Teleph. Co. v. *Edwardsville*, 70 L. Ed. 229, 269 U. S. 190, 46 S. Ct. 90.
Parker v. *Illinois*, 92 L. Ed. 886, 333 U. S. 571, 68 S. Ct. 708.

In *Parker* v. *Illinois*, 92 L. Ed. 886, 333 U. S. 571, 68 S. Ct. 708, this court said (92 L. Ed. 888-889):

> "The Court said in the Edwardsville Case that when the waiver is founded on a failure to comply with the appellate practice of a State, the question turns on whether that practice gives litigants 'a reasonable opportunity to have the issue as to the claimed right heard and determined' by the state court. 269 U. S. pp. 194, 195, 70 L. ed. 231, 46 S. Ct. 90. It was there held that the Illinois practice of requiring constitutional questions to be taken directly to the Illinois Supreme Court and of refusing to review them if review was first sought in the Appellate Court satisfied the

requirement. We adhere to that decision. The channel through which the constitutional questions, raised by petitioner in his attack on the amended order, could have been taken all the way to this Court was not only clearly marked, it was also open and unobstructed."

It is apparent that the petitioners, by failing to appeal from the judgment of the Supreme Court of Illinois transferring the cause to the Appellate Court for the First District, have waived all Federal and State constitutional issues, if any were presented by the record to the Supreme Court of Illinois. Therefore, their petition for certiorari should be denied.

III.

The Appellate Court of Illinois properly held that the petitioners' refusal to sign an immunity waiver, prior to testifying before the Grand Jury, concerning matters arising out of and during the course of their employment was "cause" for removal.

The trial court, in its written opinion, adopted the findings of fact of the Civil Service Commission but concluded that the Civil Service Commission erred in holding that petitioners' refusal to sign immunity waivers prior to testifying before the Grand Jury was conduct unbecoming a police officer and therefore cause for removal. The court held that if the decision of the Commission was permitted to stand, it would deprive the petitioners of their constitutional rights and do violence to the provisions of Section 12 of the Cities Civil Service Act (Abst. 134, 135).

We have no quarrel with the theory of the trial court that the petitioners could, under the Constitution, refuse to sign the immunity waivers. It is, however, our contention

that under the law the people are entitled to that security of their persons and property which can be assured only if police officers are men whose standards of character, responsibility and deportment are higher than those which the trial court seems to think the people ought to be forced to accept. The law does not give to any one the right to decree that the citizens must expect no greater protection of law and order, no greater security of their life and their property, than will be assured them by police officers who are permitted to place limits and conditions upon their disclosure of crime and their assistance in its prosecution. When these limits and conditions are insisted upon in cases where the police officer's own official conduct is under investigation, the effect upon popular respect for the law-enforcing agencies of the government is certain to be harmful to the community. The harm is augmented, rather than lessened, by holding that when a policeman faces the question of subordinating a constitutional privilege to discharge of his extraordinary responsibility as an officer of the law he owes no higher duty to the public interest than the thief, thug, burglar, murderer or other law-breaker whom it is his duty to apprehend and prosecute. The law does not compel any man to be a police officer. When he chooses to become one he assumes obligations to the public interest which do not rest upon the people in general.

The basic question here is not the petitioners' right to exercise a constitutional privilege but rather whether their refusal to sign the immunity waiver was a breach of their public trust which impaired the efficiency standards and morale of the police department of the City of Chicago and, therefore, constituted conduct unbecoming a police officer and was "cause" for removal under Section 12 of the Cities Civil Service Act.

Although we do not contend that the petitioners must, as police officers waive their constitutional immunity, there is substantial authority that under certain circumstances an individual, because of his employment, business or occupation or duties, is considered to have waived the right to assert his personal privilege against self-incrimination. This, even though no overt action on his part had been taken.

In *Bowles* v. *Misle,* 64 Fed. Supp. 835, the court, after reviewing many cases holding individuals may, under certain circumstances, be considered to have waived their personal privilege against self-incrimination, said (p. 843):

> "And with it, is and may well be, bracketed the further consideration that the immunities of the 4th and 5th amendments are not absolute, but are rather subject to waiver and that he who enters into, or continues in, a business subject to official regulation voluntarily submits his business records and papers to such visitorial examination as the law contemplates, and, in that measure waives his constitutional immunities of privacy in respect of his papers and against compulsory testimony."

See also *Wilson* v. *United States,* 221 U. S. 361, 31 S. Ct. 538, 55 L. Ed. 771, where this court distinguished between *private* and *public* papers and documents and held that a public officer could not assert a plea of constitutional privilege against self-incrimination when called upon to produce the *public* papers and documents in a criminal proceeding. Surely there is no distinction between a public officer withholding *public* papers and documents and a police officer withholding the facts arising out of and during the course of his *public* employment as a police officer.

This court, in the recent case of *Shapiro* v. *United States,* 335 U. S. 1-77, 68 S. Ct. 1375, 92 L. Ed. 1787, held that the statutory immunity against self-incrimination does not

extend to the production of records which were required to be kept by a valid regulation issued under the authority of the Emergency Price Control Act because such records became *public* documents as to which no constitutional privilege against self-incrimination attaches.

The trial court based its decision on the case of *In re Holland*, 377 Ill. 346 (Abst. 128, 129), which is readily distinguishable from the case at bar. Even there the court held that under certain circumstances it might be considered that an individual has waived his personal privilege against self-incrimination, saying (p. 356):

> "To say that one has an absolute right to a privilege, but if he exercise it he will be punished, is to limit his enjoyment of that right, *and unless the circumstances surrounding him or duties placed upon him are of such character as to require, in honesty and good conscience, that he waive the right,* we are unable to see wherein it can be said that an individual, be he judge, lawyer or layman, is either legally or morally guilty of a wrong should he claim the right." (Italics ours.)

That the court had in mind a police officer when it inserted the condition *"and unless the circumstances surrounding him or duties placed upon him are of such character as to require, in honesty and good conscience, that he waive the right"*, is clearly shown when the court said (p. 358):

> "It can scarcely be said that the duty resting upon a lawyer to assist in investigation of crime, a duty with which he is generally through not specifically charged, *as is a policeman,* outweighs, when considered from the standpoint of legal ethics, his moral as well as legal right to claim the constitutional privilege herein referred to in cases where he, in good faith, fears that he, though innocent, may be subjected to criminal prosecution." (Italics ours.)

In short, the *Holland* case did not, as here, involve the conduct of a *police officer,* who by reason of his position

was, as the court viewed it in that case, specifically charged with the duty of disclosing any evidence of crime.

From the foregoing it is apparent that the Supreme Court of Illinois has impliedly stated that a policeman, because of the circumstances surrounding him and the duties placed upon him should, in honesty and good conscience, waive his constitutional right against self-incrimination.

However, we do not question that the petitioners have the constitutional right to refuse to sign an immunity waiver. We contend that in refusing to do so, under the circumstances in this case, they acted in violation of their duties, failed to measure up to the high standards of character and moral conduct incumbent upon trusted police officers and were therefore guilty of conduct unbecoming police officers and subject to removal under Section 12 of the Cities Civil Service Act.

In *People ex rel. Clifford* v. *Scannell*, 77 N.Y. Supp. 704, Scannell, a fireman, was connected with an association intended to effect legislation for or on behalf of the fire department, or officers or members thereof in violation of the Charter of Greater New York, and the rules and regulations of the fire department. Charges were placed against him and his removal was ordered. He contended that unless his act in this regard would be upheld, his right as a citizen would be abridged and, therefore the provisions of the Charter and the rules and regulations were in violation of the State Constitution. The court overruled his contention saying (p. 709):

> "There is no foundation for the claim, either in law or reason. Neither the fire department, acting through its officers, nor the legislature of the state, has in the slightest degree abridged the rights of the relator in any respect. The fire department, like all

other large bodies of men, requires rules for its maintenance and discipline, without which it would be a mere mob, uncontrolled and uncontrollable, and destroyed, in every sense, for efficiency of service. What is true of it is also true of all the other branches of government where many men are employed, and where control must be had, and disipline maintained. The right of the relator to freely petition with others, to exercise the right of free speech, and to write for publication is as perfect at the present moment as it ever was; but for the purpose of discipline, absolute and necessary for the maintenance of the fire department as an efficient corps, he may not do such things in connection with such department while he is a member of it, either openly as a fireman, or under guise of an American citizen. By becoming a member of the force, he at the same time became subject to discipline according to its rules; and those rules he must obey, or be the subject of dismissal. He may not then freely write, speak, or publish, if thereby the law and the rules be violated. It is to them that he owes obedience, and if, he be not willing to yield it, his right as free and untrammeled as it ever was to emancipate himself from the shackles of the department, and exercise his right as an American citizen, whether it violate the rules of the department or not. It is therefore erroneous to say that his right of citizenship is abridged in any particular, and the courts have so held. *U. S.* v. *Newton,* 20 D. C. 226; *U. S.* v. *Curtis* (C. C.) 12 Fed. 824; *Ex parte Curtis,* 106 U. S. 371; 1 Sup. Ct. 381, 27 L. Ed. 232. The relator, being a member of the uniformed fire force of the fire department, was clearly subject to the rules and regulations of such department, and, if he violated them, was subject to dismissal. *People* v. *Board of Fire Com'rs,* 77 N. Y. 153. The power of removal by the commissioner exists for violation of the rule, and such power has been frequently exercised under similar circumstances. *People* v. *Board of Police Com'rs,* 93 N. Y. 97; *People* v. *Police Com'rs,* 11 Hun, 403; *People* v. *French,* 32 Hun, 112."

In *McAuliffe* v. *Mayor, etc., of City of New Bedford,* 29 N. E. (Mass.) 517, the plaintiff filed a petition for manda-

mus to be restored to the office of policeman in New Bedford, he having been found guilty of violating the rule of the Police Department that no member of the Department shall be allowed to solicit money or any aid, on any pretense, for any political purpose whatever. The plaintiff contended that the rule was invalid, as invading the plaintiff's right to express his political opinions; and that a breach of it was not cause sufficient for removal, under the statute. The court overruled the contention of the plaintiff saying (p. 517):

> "One answer to this argument is * * * that there is nothing in the constitution or the statute to prevent the city from attaching obedience to this rule as a condition to the office of policeman, and making it part of the good conduct required. *The petitioner may have a constitutional right to talk politics, but he has no contitutional right to be a policeman. There are few employments for hire in which the servant does not agree to suspend his constitutional rights of free speech as well as of idleness by the implied terms of his contract.* The servant cannot complain, as he takes the employment on the terms which are offered him. On the same principle the city may impose any reasonable condition upon holding offices within its control." (Italics ours.)

Also see *United Public Workers* v. *Mitchell,* 91 L. Ed. 754, 330 U. S. 75, 67 S. Ct. 556 where this court upheld the constitutionality of the Hatch Act which provided among other things that "No officer or employee in the executive branch of the Federal Government * * * shall take any active part in political management or in political campaigns."

In *Goldway* v. *Board of Higher Education,* 37 N. Y. S. 2nd, 34, the petitioner was employed as an assistant teacher of English in a high school in the State of New York. He appeared at a public hearing of the Joint Legislative

Committee to investigate the educational system of the State of New York in answer to a personal subpoena served upon him, and declined to sign a waiver of immunity. Because of this refusal he was directed to leave the witness stand and was not sworn nor did he give any testimony. Because of his action he was discharged for violating Section 903 of the New York City Charter which provided for discharge of an employee of the city who shall, after lawful notice of process, refuse to appear before any Legislative Committee or shall refuse to waive immunity from prosecution. The plaintiff contended that the statute was unconstitutional. The court in overruling the contention of the plaintiff said (p. 36):

> "The privilege against self-incrimination is not as ancient as many of our other constitutional safeguards; indeed, it may be said to be of comparatively recent origin. Taking account of its genesis, some competent students of constitutional limitations have suggested that it has outlived its sanction; and that now, it is more mischievious than salutary in its operation. Respectable authorities may readily be invoked in support of its extinction; and it is generally agreed, I think, that in all events, it should be withdrawn altogether from public officers and employees whose official conduct is under scrutiny. However all this may be, it is clear that the statute under attack here is not violative of any constitutional restriction since there is no denial of the privilege against self-incrimination. The Legislature did not purport to abrogate the right; it undertook to exercise its discretion as to the wisdom of retaining in public service an employee who exercised the privilege when his official acts are under review. It cannot be said that it is so manifestly unreasonable as to be beyond its constitutional competency for the State to determine that it is not salutary for it to continue in its employ a person who obstructs an investigation into his public conduct by a refusal to waive immunity. Clearly it is a legislative prerogative—and not for the courts to review its wisdom

—to say that it is proper that public officials should not be permitted to hold office and at the same time shield themselves by a claim of privilege in the course of an investigation of their official acts.

The Charter provision does not preclude any City employee from refusing to testify or compel him to waive immunity; indeed, that privilege was accorded to and the right was exercised by this petitioner. It does not follow that upon such refusal, constitutionally he must be permitted to retain his office. Whether the claim of privilege should be a valid ground for dismissal, becomes a matter for the controlling wisdom of the law making power. For the right to hold public employment is a privilege which may reasonably be qualified by legislative action; and I conceive that such a qualification as set forth in Section 903 may not be said to be so unreasonable as to justify the courts in striking down the statute. As Mr. Justice Holmes epitomized it in a case involving cognate considerations, 'the petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman'. *McAuliffe* v. *City of New Bedford,* 155 Mass. 216, 29 N. E. 517." (Italics ours.)

In *Souder* v. *City of Philadelphia,* 156 Atl. (Pa.) 245, the Grand Jury was investigating certain police officials of the City of Philadelphia. Souder, a Captain of Police, was unable to explain satisfactorily the source of his large personal estate. Charges were brought against him by the Civil Service Commission of conduct unbecoming an officer. In the Civil Service Commission's finding a majority of the Civil Serice Commission set forth that Souder had made no defense to the charges, and that in their opinion it was his duty to answer them, and they therefore found him guilty of conduct unbecoming an officer and dismissed him from the service. The court in sustaining the action of the Commission said (p. 246):

"Souder was a captain of police, whose duty it was not only to guard and protect the citizens of the mu-

nicipality which had honored him with its confidence by appointing him to the high position of trust and civic responsibility which he filled and to run down and bring to justice malefactors within its limits, but also, as an officer in high command of its police, to preserve and enforce discipline among those over whom he had been placed in a position of authority. It was essential in the proper discharge of his duties that he should comport himself as an officer in such manner that no act of wrongdoing should attach itself to him, to the end that those who served under him should feel for him that respect which insures confidence and obedience. As such an officer in such a station he should have been keen to see that no taint of evil doing attached itself to him, and when charges were made, reflecting upon his honesty and integrity, that they were met with denial and answering proofs of not delinquencies."

In the case of *Scholl* v. *Bell*, 102 S. W. (Ky.) 248, certain police officers refused to testify in the trial court in the exercise of their constitutional privilege against self-incrimination. The court in condemning their action said (p. 261):

"Here were police officers being interrogated as to existence of crimes they were paid to prevent, if possible; if not, to expose and punish afterwards; and yet they one and all refused to answer 'under advice of counsel.' Suppose a secret murder had been committed, and the police on that beat, when asked about it, should say, 'I decline to answer for fear of incriminating myself.' This, under the rule invoked, would protect the witness from answering; but how long would it justify his retention on the roll of the police? What would be thought of those who left the public safety in his hands longer than it would require to discharge him?"

In *Christal* v. *Police Com. of San Francisco*, 92 P. 2nd (Cal.) 416, the appellants were formerly police officers in the city and county of San Francisco. During a Grand

Jury investigation they were subpoenaed to appear and testify. They refused to testify concerning their acts and conduct and thereafter charges were filed against them for conduct unbecoming an officer and disobedience or orders. The police commissioners discharged them. A rule of the police department provided that members of the department should testify without reservation in any investigation conducted before the Grand Jury as well as in cases before the courts. The court in affirming the action of the police commissioners said that the main question involved was whether appellants, while holding positions as police officers, could exercise the constitutional privilege of refusing to testify before the Grand Jury under the circumstances and still insist upon retaining their positions as police officers. The court stated that it was of the opinion that they could not and that its conclusion was reached without resort to a consideration of the violation of the rule of the police department. The court in discussing the duties of a police officer said (p. 419):

> "The duties of police officers are many and varied. 21 Cal. Jur. 400 *et seq.* Such officers are the guardians of the peace and security of the community, and the efficiency of our whole system, designed for the purpose of maintaining law and order, depends upon the extent to which such officers perform their duties and are faithful to the trust reposed in them. Among the duties of police officers are those of preventing the commission of crime, of assisting in its detection, and of disclosing all information known to them which may lead to the apprehension and punishment of those who have transgressed our laws. When police officers acquire knowledge of facts which will tend to incriminate any person, it is their duty to disclose such facts to their superiors and to testify freely concerning such facts when called upon to do so before any duly constituted court or grand jury. *It is for the performance of these duties that police officers are commissioned*

and paid by the community, and it is a violation of said duties for any police officer to refuse to disclose pertinent facts within his knowledge even though such disclosure may show, or tend to show, that he himself has engaged in criminal activities.'' (Italics ours.)

The court in discussing the question of constitutional immunity said (p. 419):

"We are not unmindful of the constitutional privilege above mentioned which may be exercised by all persons, including police officers, in any proceeding, civil or criminal. *In re Lemon, supra; In re Hoertkorn, supra.* As we view the situation, when pertinent questions were propounded to appellants before the grand jury, the answers to which questions would tend to incriminate them, they were put to a choice which they voluntarily made. *Duty required them to answer. Privilege permitted them to refuse to answer. They chose to exercise the privilege, but the exercise of such privilege was wholly inconsistent with their duty as police officers. They claim that they had a constitutional right to refuse to answer under the circumstances, but it is certain that they had no constitutional right to remain police officers in the face of their clear violation of the duty imposed upon them. McAuliffe* v. *Mayor of New Bedford,* 155 Mass. 216, 29 N. E. 517. *We are of the opinion that such a violation of duty would constitute cause for dismissal even in the absence of any specific rule requiring such officers to give testimony before the grand jury, or of any specific rule relating to 'conduct unbecoming an officer'. That such conduct constituted 'conduct unbecoming an officer', there can be no doubt.* (Italics ours.)

* * * * * *

There is nothing startling in the conception that a public servant's right to retain his office or employment should depend upon his willingness to forego his constitutional rights and privileges to the extent that the exercise of such rights and privileges may be inconsistent with the performance of the duties of his office or employment. One of the most cherished

rights guaranteed by the constitution is that of freedom of speech, yet no one would maintain that a police officer could fully exercise that right without violating the duties imposed upon him by the acceptance of his employment as a police officer. The right of freedom of speech might be relied upon by a police officer who had disclosed, to persons conducting an illegal establishment, information concerning the plan of the police department to conduct a raid upon such establishment, but the furnishing of such information would be inconsistent with and violative of the duties of such police officer. Such conduct would constitute cause for dismissal with or without any specific rule on the particular subject, and in the event of the adoption of a rule providing for dismissal of any officer making such disclosure, the claim that such rule violated any constitutional right of the officers would be clearly untenable."

The case of *Canteline* v. *McClellan,* 25 N. E. 2d (N. Y.) 972, decided by the New York Court of Appeals in 1940, involved the removal of a police officer for *refusal to sign an immunity waiver.* There the court cited with approval the *Christal* case in California, in which police officers were discharged *for refusal to testify* and observed that a "similar question" was presented in that case. The New York Court obviously regarded the action of a police officer in refusing either to sign an immunity waiver or in refusing to testify as involving a similar breach of duty.

It is true that in the *Christal* case there was a police department rule requiring police officers to testify and that in the *Canteline* case there was a provision in the State Constitution bearing on the refusal to testify (although this provision went into effect after the refusal involved in that case), but in both the *Christal* and *Canteline* cases the courts made it plain that their decision did not depend on any such rule or constitutional provision.

Several of the police cases cited herein were reviewed by the court in the case of *In re Holland,* 377 Ill. 346. The court distinguished these cases from the case then under consideration on the ground that (p. 357):

> "In such cases it was recognized that the officer was especially charged with the duty to prevent crime and to disclose any evidence that would assist in the apprehension of criminals."

The court then stated (p. 358) that in its opinion a policeman had the specific duty to assist in investigation of crime. It is therefore apparent that the *Holland* case sustains our contention that the petitioners' refusal to sign an immunity waiver preliminary to testifying before the Grand Jury on matters arising out of and within the scope of their duties, was conduct unbecoming a police officer and subjected the petitioners to removal.

In 15 St. John's Law Review, page 51, there is a complete discussion of the matter involved in the case at bar and the writer there stated:

> "A police officer is a state or public officer. The municipality appoints him as a matter of convenience, under state-granted authority. His duties are more than local. They are public in nature and include the governmental function of preserving peace and order for the public at large. As his civil responsibility he must prevent and aid in the detection of crime and protect the citizens at large. The security of the community and the efficiency of the government's executive system depend on the extent to which he performs his duties and is faithful to his trust. It is the duty of all citizens, government officials, and especially police officers, to aid in the administration of justice and to disclose information which might tend to bring about the apprehension and punishment of the guilty. When summoned, it is incumbent on them to attend and be sworn by the grand jury or any other investigatory body. They must testify freely of facts within their knowledge, although subjecting themselves to

> self-incrimination. A refusal to answer for such cause is a breach of duty, and is 'conduct unbecoming an officer', subjecting him to dismissal."

There appears to be no reported case in any jurisdiction upholding the right of a police officer to refuse either to sign an immunity waiver or to testify when called to testify in a criminal case.

Of the four cases herein cited involving police officers, three involving a refusal to testify and one a refusal to sign an immunity waiver, all are consonant with the principle that a police officer by reason of his special status, duties and responsibility may not in any manner exercise his constitutional privilege against self-incrimination in matters touching upon his occupation without being guilty of a breach of duty on his part by such refusal.

In *O'Regan* v. *City of Chicago* (Chicago Legal News, Vol. 37, p. 150, Dec. 24, 1904) Judge Murray F. Tuley rendered an opinion (cited with approval in the case of *Coane* v. *Geary,* 298 Ill. App. 199) in which he stated (p. 206 of the *Coane* case):

> "A police force is peculiar, *sui generis,* you may say, in its formation and in its relation to the city government. It is practically an organized force resembling in many respects a military force, organized under the laws of the United States and equally as important as to the functions it is required to perform. It is not an ordinary branch of the executive government like the mayor's office even, your water department, the comptroller's department, the health department, even; but, as I say, it is peculiar to itself, and to look at it in the same light that other branches of the executive department are regarded would be a mistake in a judicial decision. It is a department which requires that the members of it shall surrender their individual opinion and power to act, and submit to that of a controlling head just as much as the common soldier must surrender his own opinion

and power of action to that of his commanding officer. And there is the same necessity of discipline—of regulation existing in the police department that exists in regard to the military department. Strict discipline must be enforced, and it must be enforced in a manner that is effective, and without the supervision or regulation of any other department of the state, and particularly, without any attempt on the part of the judicial department (which is a branch of the government entirely distinct and separate from the executive department), to regulate it in any way, and particularly, to regulate its discipline."

The trial court, in its written opinion, stresses the fact that the Commission has specifically dismissed the charge against the petitioners that they unlawfully conspired to procure indictments (Abst. 130). The Commission merely held that the evidence introduced before it was insufficient to sustain the charge of unlawful conspiracy relating to the procurement of the indictment (Abst. 36). It should be borne in mind that although a conspiracy indictment was returned against the petitioners by the Grand Jury the case never went to trial but was *nolle prossed* by the State's Attorney because White, one of the State's Attorneys' principal witnesses, had been killed (Abst. 36). Also petitioners' refusal to testify before the Grand Jury blocked the State's Attorney from securing evidence which might convict the petitioners on the conspiracy indictment. The court asked (Abst. 130):

> "Since they (Connelly and Drury) have been specifically absolved from any wrong-doing, how can a stigma attach concerning their refusal to sign an immunity waiver regarding these matters?"

The fact that the Commission absolved the petitioners from any wrong-doing in the procuring of the indictments by the petitioners does not absolve them from conduct unbecoming a police officer for their refusal to sign an immunity

waiver. There were two charges filed before the Civil Service Commission against the petitioners. One was that they unlawfully conspired to procure indictments. This charge the Commission dismissed. The other charge was that they were guilty of conduct unbecoming a police officer because they refused to sign the immunity waiver. The petitioners admit that they refused to sign an immunity waiver. The Commission found that the petitioners refused to sign an immunity waiver. The trial court accepted the findings of fact of the Commission and therefore the trial court has found that the petitioners refused to sign an immunity waiver (Abst. 126). With this fact proven and admitted, under the cases discussed herein, the petitioners were guilty of conduct unbecoming a police officer and their removal by the Commission was with "cause" as provided for in Section 12 of the Civil Service Act. The contrary finding by the trial court was erroneous and the Appellate Court properly reversed the same.

(A) Discussion of In re Holland, 377 Ill. 346.

The Petition for Writ of Certiorari consists principally of a discussion of the facts and law in the *Holland* case and an attempt by the petitioners, through distortion of the facts, to bring the case at bar within the purview of the *Holland* decision. A proper understanding of that case will show that it cannot be interpreted in the manner contended for by the petitioners.

In the *Holland* case the "grand jury of Cook county was engaged in investigating the death of one Edward J. O'Hare who was killed * * * on the streets of Chicago" (p. 347). During the course of the investigation Holland, a Judge of the Municipal Court of Chicago, was called before the Grand Jury. He refused to sign an immunity

waiver. In testifying before the Grand Jury he answered all questions concerning the killing of O'Hare, declaring he knew nothing about it, but refused to answer, upon advice of counsel and under his constitutional rights, questions put to him pertaining to his association and business dealings with O'Hare. Previous to appearing before the Grand Jury, Holland had a conference with the First Assistant State's Attorney in which the utmost frankness and cooperation was shown by Holland in answering questions put to him, including questions on Holland's business transactions with O'Hare. Holland contended that the reason he refused to sign an immunity waiver was that there had been previous animosity between the State's Attorney and himself, growing out of political feuds of opposing factions in the same political party. Therefore, Holland became suspicious that the State's Attorney, instead of desiring to question him in the investigation as to the cause of death of O'Hare, was seeking to investigate Holland.

Proceedings were instituted to have Holland suspended from the practice of law for a period of two years. The court stated (p. 348) that Holland could be tried only as a lawyer and not as a judge. The question presented for decision in the *Holland* case was whether a lawyer, though possessing the constitutional privilege, "has nevertheless an overshadowing duty as a lawyer to refuse to exercise it in a case such as this, and that his failure to so refuse renders him subject to discipline" (p. 352). The court held that there is no duty resting upon a lawyer to assist in an investigation of crime saying (p. 358):

> "It can scarcely be said that the duty resting upon a lawyer to assist in investigation of crime, a duty with which he is generally though not specifically charged, as is a policeman, outweighs, when con-

> sidered from the standpoint of legal ethics, his moral as well as legal right to claim the constitutional privilege herein referred to in cases where he, in good faith, fears that he, though innocent, may be subjected to criminal prosecution."

The court also held that under certain circumstances it might be considered that an individual has waived his personal privilege against self-incrimination saying (p. 356):

> "To say that one has an absolute right to a privilege, but if he exercise it he will be punished, is to limit his enjoyment of that right, and unless the circumstances surrounding him or duties placed upon him are of such character as to require, in honesty and good conscience, that he waive the right, we are unable to see wherein it can be said that an individual, be he judge, lawyer or layman, is either legally or morally guilty of a wrong should he claim the right."

That the court had in mind a police officer when it inserted the condition *"and unless the circumstances surrounding him or duties placed upon him are of such character as to require, in honesty and good conscience, that he waive the right"* is clearly shown when the court, distinguishing the *Holland* case from the cases of other jurisdictions pertaining to police officers, said (p. 357):

> "*Amicus curiae* has cited cases where police officers were sought to be disciplined because they refused to answer questions put to them on the ground of constitutional privilege. In such cases it was recognized that the officer was especially charged with the duty to prevent crime and to disclose any evidence that would assist in the apprehension of criminals."

as well as when the court (p. 358) distinguished between the duty resting upon a lawyer and the duty resting upon a policeman.

The *Holland* case is readily distinguishable from the facts in the case at bar in the following respects:

1. In the *Holland* case the State's Attorney was attempting to investigate the conduct of Holland in regard to matters other than and foreign to the matter being investigated by the Grand Jury—the killing of O'Hare.

In the case at bar the Grand Jury, on April 2, 1947, was investigating the conduct of Drury and Connelly pertaining to their personal conduct as police officers (Abst. 32-35).

In the *Holland* case the Grand Jury was investigating the killing of O'Hare and not the association and business dealings that Holland had with O'Hare. In the case at bar the Grand Jury, on April 2, 1947, was not investigating the killing of Ragen but was investigating the conduct of Drury and Connelly in the performance of their duties as police officers.

If in the *Holland* case Judge Holland had refused to testify pertaining to the killing of O'Hare it is apparent from the court's opinion that the court would have disciplined him.

2. In the *Holland* case Holland claimed his constitutional privilege on the basis of being a lawyer and not as a judge. His association and dealings with O'Hare were on the basis of his being a lawyer and not a judge. It is apparent that if the Grand Jury were investigating the actions of Holland as a judge pertaining to the killing of O'Hare that, under such circumstances, Holland would not be justified in claiming his constitutional privilege. This is clearly shown when the court, in discussing the case of *In re Harriss,* 364 Ill. 290 (*Holland* case p. 358), pointed out that the acts of Harriss were judicial acts which subjected him to the strictest censure and condemnation.

Throughout the *Holland* case the court distinguishes the conduct and rights and duties of a lawyer or layman from the rights and duties of a policeman or other public officer in the performance of his official duties. The court clearly implies that a policeman, especially charged with the duty to prevent crime and to disclose any evidence that would assist in the apprehension of criminals, does not have the right to exercise his constitutional privilege in an investigation pertaining to his duties as a policeman and still retain his position as a police officer. The *Holland* case is authority for the proposition that a police officer, because of the circumstances surrounding him and the duties placed upon him should, in honesty and good conscience, waive his constitutional right against self-incrimination when being investigated pertaining to his duties as a policeman or forfeit his position in which he has sworn to protect the life and property of the persons residing in the community by which he is employed.

The respondents based their decision not upon the constitutional question of whether a police officer, because of the circumstances surrounding him and the duties placed upon him, has waived his right against self-incrimination, but on the fact that the petitioners, in refusing to sign an immunity waiver, under the circumstances in this case, acted in violation of their duties, failed to measure up to the high standard of character and moral conduct incumbent upon trusted police officers and were, therefore, guilty of conduct unbecoming a police officer and subject to removal under Section 12 of the Cities Civil Service Act.

3. The petitioners attempt to bring the facts in the case at bar in line with the facts in the *Holland* case by showing that in the *Holland* case Judge Holland testified freely before the Grand Jury pertaining to the O'Hare killing and that the petitioners in the case at bar testified

freely before the Grand Jury on March 14, 1947 (Abst. 30) when the Grand Jury was investigating the killing of Ragen. At that hearing Russell, White, and Davidson, together with Drury and Connelly, testified to the facts and circumstances surrounding the Ragen murder (Abst. 30). As a result of this investigation the Grand Jury on March 17, 1947 returned an indictment for the murder of Ragen against Block, Patrick, and Yaris (Abst. 32). This completed the Grand Jury investigation of the murder of Ragen.

On April 2, 1947 the Grand Jury was investigating White and Russell's change of testimony and also their charge that Drury and Connelly had intimidated them in order to force them to testify before the March Grand Jury, that they could identify Block, Patrick, and Yaris as the participants in the Ragen shooting (Abst. 32-33). It was during this investigation that Drury and Connelly were again called before the Grand Jury for questioning. It was during this investigation that Drury and Connelly, each in turn, appeared before the Grand Jury, and refused to sign immunity waivers (Abst. 33-34).

In this regard the facts in the case at bar are in no way analogous to the facts in the *Holland* case. Here Drury and Connelly refused to sign immunity waivers and did not testify before the Grand Jury on April 2, 1947 during an investigation of their conduct as police officers. The murder of Ragen was not being investigated at the time they were requested to sign immunity waivers. On April 2, 1947 the Grand Jury was investigating the conduct of Drury and Connelly and not the murder of Ragen.

4. The petitioners also attempt to bring the facts in the case at bar in line with the facts in the *Holland* case by showing that the court in the *Holland* case took cog-

nizance of the fact that there was animosity between the State's Attorney and Holland, and that Holland therefore became suspicious that the State's Attorney, instead of desiring to question him in the investigation as to the cause of the death of O'Hare, was seeking to investigate Holland. The petitioners, in the case at bar, continuously state that the State's Attorney was hostile to them and because of such hostility and animosity desired to indict Drury and Connelly regardless of their innocence or guilt pertaining to their conduct as police officers, and that by reason thereof they were justified in refusing to sign immunity waivers.

The record fails to disclose any hostility or animosity by the State's Attorney against Drury and Connelly, or either of them. It is well to remember that the Trial Court, in overruling the decision of the Civil Service Commission to discharge Drury and Connelly, accepted the Findings of Fact of the Commission (Abst. 120-121) and merely differed with the conclusion of the Commission on a question of law. The Findings of Fact of the Commission (Abst. 44-51) contain nothing from which the conclusion can be drawn that the State's Attorney was hostile or held any animosity towards Drury and Connelly. The only conversation between Drury or Connelly and the State's Attorney, appearing in the Findings of the Commission, is as follows (Abst. 47):

> "(13) At the conclusion of such questioning of Connelly he stated to the State's Attorney that he supposed that he was 'in bad' because of his former suspension and the State's Attorney replied substantially as follows:
>
> 'Just a moment, Captain, I had nothing to do with your former suspension and it has nothing to do with this hearing. Just remember this, that if I should ever have occasion to take you or any other police officer to the Trial Board (referring to this

Commission) I will have the evidence that will make the charges stick.'

"(14) Thereupon Captain Connelly repeated the said remarks of the State's Attorney to the respondent, and the respondent and Connelly were disturbed thereby and by the said questioning in the office of the said State's Attorney, and each told the Commissioner that he was willing to resign from the said Police Department if the Commissioner so desired, but were told by him not to get excited."

This discussion between Connelly and the State's Attorney fails to sustain the assertion of the petitioners. The petitioners, although repeatedly stating there was such hostility and animosity, fail to point to any place in the abstract where it can be found.

The petitioners do not confine their argument to the facts appearing in the record. They neglect to clearly state to this court that the Grand Jury on April 2, 1947 was investigating the conduct of Drury and Connelly in the performance of their duties as police officers. The investigation by the Grand Jury on April 2, 1947 concerned the conduct of Drury and Connelly in securing the testimony of White and Russell. The hearing was to determine whether Drury and Connelly had threatened to send White back to the penitentiary for a parole violation and promised him a $5,000 reward if he would identify Block, Patrick and Yaris as participants in the Ragen shooting (Abst. 33); whether Drury and Connelly harassed and threatened Russell to get him to identify pictures shown to him of supposed participants in the shooting (Abst. 33).

It is apparent that the Grand Jury investigation of April 2, 1947 was concerned with a matter separate and distinct from the investigation conducted on March 17, 1947 by the March Grand Jury. The investigation of April 2, 1947, was directed at the personal acts and conduct of Drury

and Connelly arising out of and during the course of their employment as police officers while investigating the Ragen shooting. It was at this investigation that Drury and Connelly refused to sign immunity waivers and testify to their acts and conduct as police officers. It was because of this refusal that the Commissioner of Police on April 24, 1947 filed the charges with the Civil Service Commission of the City of Chicago which led to their discharge (Abst. 28).

The State's Attorney, on April 2, 1947 with these facts in his possession, was duty bound to present such facts to the Grand Jury. It was not a question of hostility and animosity, if any, of the State's Attorney against Drury and Connelly, but a question of the State's Attorney performing his duty.

The petitioners argue (pp. 38-41) that they acted in good faith and refused to sign the immunity waivers because of the hostility of the State's Attorney and their knowledge that the State's Attorney intended to cause the Grand Jury to return an indictment against them. The purpose of compelling a witness before the Grand Jury to sign an immunity waiver prior to testifying is so that the testimony of said witness may be used against him in a criminal proceeding in the event an indictment is issued. If, as contended by the petitioners, they did nothing during their investigation of the Ragen murder which might result in a criminal indictment against them there would be no reason for them to refuse to sign an immunity waiver. They would have willingly signed the immunity waivers, testified fully and completely before the Grand Jury knowing that if the Grand Jury did return an indictment against them anything they might have said before the Grand Jury would not have harmed them or incriminated them in the criminal proceedings because

they would know that nothing they did during the investigation of the Ragen murder was contrary to the laws of the State of Illinois. Therefore, even if the State's Attorney was hostile toward the petitioners and even if the petitioners knew that because of such hostility the State's Attorney intended to seek an indictment against them by the Grand Jury it still was their duty, as police officers, to sign the immunity waivers and testify freely and fully before the Grand Jury. Any other action on their part destroys their usefulness as police officers of the City of Chicago. The mere fact that they refused to sign an immunity waiver, with or without the hostility of the State's Attorney and with or without their good faith, during a Grand Jury investigation concerning matters arising out of and during the course of their employment was "cause" for removal, under Section 12 of the Cities Service Act.

This thought is ably expressed in the opinion of the Appellate Court of Illinois, (*Drury* v. *Hurley,* 330 Ill. App. 33) when it said (p. 50):

> "In the light of what has been said we think the distinction between refusing to testify and the refusal to sign an immunity waiver before testifying before the grand jury is more imaginary than real, and as pointed out in the excellent analysis of the subject above referred to (Journal of Criminal Law and Criminology of Northwestern University, vol. 38, No. 6, March-April, 1948, p. 619, comments by Dale E. Sherrow.), "Refusal to sign an immunity waiver can mean only one thing—the person refusing to sign is unwilling to expose all he knows about certain alleged criminal activities because the exposure will tend to incriminate him. That is the only ground upon which this constitutional privilege can be invoked. Refusal to sign the waiver would seem to be just as much a breach a duty as an actual refusal to testify."

It is apparent that the petitioners' argument that their refusal to sign immunity waivers was justifiable and should not be "cause" for removal from the police department of the City of Chicago falls by its own weight. If they had not performed any criminal acts during their investigation of the Ragen murder they should have willingly signed the immunity waivers because their testimony before the Grand Jury would not incriminate them and would not be useful to the prosecution in a criminal proceedings. If, during their investigation of the Ragen murder, they performed certain acts contrary to the laws of the State of Illinois, and by reason thereof refused to sign the immunity waivers their usefulness as police officers ceased. The question involved in the case at bar is whether petitioners' refusal to sign the immunity waivers was a breach of their public trust which impaired the efficiency, standards and morale of the police department of the City of Chicago and, therefore, constituted conduct unbecoming a police officer and was "cause" for removal under Section 12 of the Cities Civil Service act. The fallacious claim of the petitioners, unsupported by the record, that the State's Attorney was hostile toward them has no bearing on this ultimate and sole issue.

The Grand Jury, on April 2, 1947, was not investigating the killing of Ragen but rather the personal acts and conduct of Drury and Connelly arising out of and during the course of their employment as police officers. It was at this investigation that Drury and Connelly refused to sign immunity waivers. We do not contend that Drury and Connelly could not exercise their constitutional privilege in this regard. However, we do contend that if they did exercise such privilege and refused to testify before the Grand Jury as to their personal acts and conduct arising out of and during the course of their employment as police

officers, they acted in violation of their duties and failed to measure up to the high standards of character and morals incumbent upon trusted police officers and were, therefore, guilty of conduct unbecoming a police officer and subject to removal under Section 12 of the Cities Civil Service Act.

The petitioners have failed to meet this issue. Their petition for writ of certiorari is barren of a discussion of this all important point. They ignore it and argue that Drury and Connelly were justified in refusing to sign immunity waivers because the State's Attorney was hostile and antagonistic to them. We have ofttimes stated that the issue in the case at bar is not a question of the right or privilege of Drury and Connelly to refuse to sign immunity waivers, irrespective of the reason therefor—hostility or animosity of the State's Attorney, if any, or otherwise—but rather the right of the Civil Service Commission to discharge Drury and Connelly for failing to perform their police duties or by so acting as to impugn their own integrity and render them ineffective as law enforcing agents. The refusal to testify fully in cooperation with the law enforcing agencies renders Drury and Connelly, as police officers useless to the Police Department of the City of Chicago. They can hardly be expected to be considered diligent officers of the law when they had in effect admitted that they had something to conceal lest it incriminate them.

From the foregoing discussion of the *Holland* case and its application to the case at bar, it becomes apparent that the facts in the instant case are distinguishable from the facts in the *Holland* case. The *Holland* decision was based upon the rights and duties of a lawyer in his individual capacity and not upon the rights and duties of a judge in his judicial capacity. In the case at bar the Grand Jury, on April 2, 1947, was investigating the conduct of

Drury and Connelly not in their individual capacity, but rather in their capacity as police officers and the performance of their duties as such police officers arising out of and during the course of their employment. The court, in the *Holland* case, clearly recognized the distinction between a police officer and a lawyer who is not specifically charged, as is a police officer, with the duty to enforce laws, and implied that a police officer is especially charged with the duty to prevent crime and to disclose any evidence that would assist in the apprehension of criminals, and that such duty placed upon him is of such character as to require, in honesty and good conscience, that he waive his right against self-incrimination; and that if he fails to do so he is subject to discipline. The *Holland* case involved the question of whether a lawyer has the right to refuse to sign an immunity waiver prior to being interrogated by the Grand Jury during an investigation of a matter in which the lawyer was in no way involved. The sole question in the case at bar is whether the Civil Service Commission has the right to discharge a police officer who refuses to sign an immunity waiver prior to testifying before the Grand Jury during an investigation pertaining to the personal acts and conduct of such police officer arising out of and during the course of his employment.

The *Holland* case is not authority for the proposition that the Civil Service Commission cannot discharge a police officer for conduct unbecoming a police officer if he refuses to sign an immunity waiver prior to testifying before the Grand Jury investigating the personal acts and conduct of such police officer arising out of and during the course of his employment.

IV.

Class legislation and discrimination is not an issue in the case at bar.

Petitioners argue (Petition pp. 24, 29, 34, 36-37, 42) that the ruling of the Civil Service Commission and the judgments of the Appellate Court and Supreme Court of the State of Illinois results in class legislation and discrimination against police officers, and particularly against the petitioners.

The Civil Service Commission and the courts of Illinois do not create class legislation or any other kind of legislation. That is the sole province of the General Assembly of the State of Illinois. The General Assembly enacted the Cities Civil Service Act including Section 12 thereof. This Act has been held constitutional by the Supreme Court of the State of Illinois (*The People* v. *Kipley*, 171 Ill. 44, 70-72; *The People* v. *City of Chicago*, 337 Ill. 100, 103-106).

In *The People* v. *City of Chicago*, 337 Ill. 100, the Supreme Court of Illinois held that Section 12 of the Cities Civil Service Act is not unconstitutional as class or special legislation, saying (p. 108):

> "We are of the opinion that this provision of section 12 finds basis in a substantial distinction between a laborer and others included under the Civil Service act, which distinction bears a reasonable relation to the purposes of the legislation, and that the difference in manner of discharging appellant there provided does not render the act invalid. *People* v. *Brady, supra; People* v. *Coffin*, 282 Ill. 599; *People* v. *Loeffler, supra; People* v. *Waring*, 149 N. Y. 621; Black on Const. Law, pp. 574, 575.
>
> Nor can this act be said to be special legislation, in contravention of section 22 of article 4 of the constitution, since it applies to all persons classified by the

civil service of the city of Chicago as laborers and is operative only after its adoption by a vote of the people. *People* v. *Kipley, supra.*"

The ruling of the Civil Service Commission and the judgments of the Appellate and Supreme Courts of Illinois do not result in class legislation or discrimination against police officers. The effect of their decisions results merely in the construction of the Cities Civil Service Act and particularly Section 12 thereof. Their decisions are a determination that it is "cause" for removal, under Section 12 of the Act, for a police officer to refuse to sign an immunity waiver, prior to testifying before the Grand Jury, concerning matters arising out of and during the course of his employment.

As we have hereinbefore pointed out under Point III, a police department, as noted by Judge Murray F. Tuley, is peculiar in that it is practically an organized civil force resembling in many respects a military force; it is a department which requires that the members of it shall surrender their individual opinion and power to act and submit to that of a controlling head, just as much as a common soldier must surrender his own opinion and power of action to that of his commanding officer. The necessity of discipline, because of the peculiar duties and dangers which members of a police force encounter and the necessarily high degree of integrity which every member must maintain in order that public confidence and respect in the officers of the law may be justified, are a sufficient basis for classifying police officers as separate and apart in many of these respects from an ordinary employee. Based on the foregoing, the complaint of the petitioners that they are discriminated against because they are police officers, is unsound and untenable. They have deliberately selected a vocation which requires that they surrender certain of their

personal privileges. The recognition of this fact by the Civil Service Commission and the courts of the State of Illinois, and courts of other jurisdictions in this country, results in the inescapable conclusion that classifying police officers in a separate category is based upon a reasonable difference between them and other employees or citizens and constitutes a complete answer to their complaint that they have been unlawfully discriminated against.

Conclusion.

The respondents have conclusively demonstrated as follows:

1. That the petitioners failed to raise any constitutional issues in the State courts, and are, therefore, precluded from seeking a review in this court.

2. That the petitioners waived all constitutional issues, if any, by not appealing to this court from the judgment of the Supreme Court of Illinois, which transferred the cause to the Appellate Court of Illinois, First District.

3. That neither the Supreme Court nor the Appellate Court of Illinois determined a constitutional question but rather limited their decisions to a construction of the statute, namely, whether petitioners' refusal to sign immunity waivers constituted conduct unbecoming a police officer and was "cause" for removal under Section 12 of the Cities Civil Service Act of the State of Illinois.

4. Under certain circumstances an individual might, because of his employment, business or occupation, or duties, be considered to have waived his right to assert his personal privilege against self-incrimination.

5. The petitioners have the right to refuse to testify and to refuse to waive their immunity, but it does not follow

that upon such refusal, constitutionally, they must be permitted to retain their office.

6. The refusal of the petitioners to sign an immunity waiver prior to testifying before the Grand Jury as to matters arising out of and during the course of their employment is "cause" for removal under Section 12 of the Cities Civil Service Act of the State of Illinois.

7. That the basic question here is not the petitioners' right to exercise a constitutional privilege but rather whether their refusal to sign an immunity waiver was a breach of their public trust which impaired the efficiency, standards and morale of the police department of the City of Chicago and, therefore, constituted conduct unbecoming a police officer and was "cause" for removal under Section 12 of the Cities Civil Service Act of the State of Illinois.

8. That the classification of police officers in a separate category is based upon a reasonable difference between them and other employees or citizens.

9. The decision of the Appellate Court of Illinois is in accordance with the law and in no way conflicts with the Federal Constitution.

WHEREFORE, The respondents pray that this court deny the Petitions for Writ of Certiorari filed herein.

Respectfully submitted,

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